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IN THE

# Supreme Court of the United States

BOY SCOUTS OF AMERICA, ET AL.,

*Petitioners,*

*v.*

NANCY WYMAN,
COMPTROLLER OF THE STATE OF CONNECTICUT, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of the First Amendment claim of the Boy Scouts.

## INTEREST OF AMICUS CURIAE[1]

Citizens for the Preservation of Constitutional Rights ("CPCR") is a nonprofit corporation. Through its litigation activities, CPCR seeks to protect the constitutional rights of individual citizens against unlawful encroachment by the state. The Boy Scouts' First Amendment rights to freedom of speech and association are individual rights which fall squarely within the parameters of concern which form the basis for CPCR's existence and mission. "[R]ights created by the first section of the First Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

Founding members of CPCR have litigated constitutional issues at every level of the state and federal system, including the United States Supreme Court. As counsel for petitioners in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston.*, 515 U.S. 557 (1995), CPCR has a special interest in preserving this Court's unanimous holding in that case.

## STATEMENT OF THE CASE

Amicus adopts the statement of facts, constitutional provisions and statutes as set forth in the appeal brief for the Boy Scouts.

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[1] Counsel for the parties have consented to the filing of this *amicus* brief. Their joint notice of consent is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. Sean Brady contributed the printing costs associated with the preparation and submission of this brief for the Citizens for the Preservation of Constitutional Rights.

## SUMMARY OF ARGUMENT

The Second Circuit's decision dismantles this Court's unanimous holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), by compelling the Boy Scouts to convey a message with which they disagree. In *Hurley* the Court unanimously held that requiring an organization of private citizens to include among its members a person or group imparting a message the organizers do not wish to convey violates the First Amendment. Likewise, the Boy Scouts merely seek to prevent their members from conveying a message they do not wish to convey. The Boy Scouts, like the parade organizers in *Hurley*, may exclude those members imparting a message the Scouts do not wish to convey because the First Amendment fully protects a speaker's autonomy to choose the content of his own message. Therefore, the State of Connecticut, in compelling the inclusion of an unwanted and antithetical message, violates the Boy Scouts' First Amendment guarantee of freedom of speech.

The Boy Scouts are in a nearly identical situation to the parade organizers in *Hurley*. Like the parade organizers, the South Boston Allied War Veterans Council ("Council"), the Scouts wish only to control the message that their own members convey. As a result, the Boy Scouts only exclude a member based on sexual orientation if that member *speaks* with a message that contradicts the message that the Boy Scouts wish to convey. The Scouts, like the Council, do not exclude any member merely on the basis of sexual orientation.

This distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation was instrumental in *Hurley*. There, the Court recognized that the Council did not seek to exclude homosexuals as such from participating in the parade. Rather, the Council only sought to prevent marchers from imparting a message the organizers did not

wish to convey. Similarly, the Boy Scouts do not discriminate against or exclude any scout merely on the basis of his or her sexual orientation. The Boy Scouts seek only to prevent a member from imparting an unwanted and antithetical message.

Thus, here, as in *Hurley*, the State is attempting to mandate that a private organization include speech with which it disagrees.[2] However, as this Court concluded in *Hurley*: "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. The Second Circuit's decision, which allows Connecticut to exclude the Scouts for speech covered by this "fundamental rule of protection," is thus not only an affront to the First Amendment, but a direct challenge to this Court's unanimous holding in *Hurley*. The decision, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions.

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[2] The result in *Hurley* would have been exactly the same whether (i) the State mandated that the Council include the Irish-American Gay, Lesbian and Bisexual Group ("GLIB") and its message in the Council's parade, or (ii) the State denied the Council a parade permit unless it included GLIB and its message. Both constitute compelled speech. *See infra* I.3. Similarly, the State's action would also have constituted compelled speech if the State had attempted to charge the Council different prices for a parade permit depending on whether or not the Council included GLIB and its message.

## ARGUMENT

### I. The Decision Below Conflicts With This Court's Unanimous Decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* and Other Cases Protecting the First Amendment Right of the Boy Scouts to Exclude Speech With Which the Scouts Disagree.

The Second Circuit's decision directly contradicts *Hurley*. The court below failed to grasp that, like the Council in *Hurley*, the Boys Scouts do not exclude anyone merely on the basis of sexual orientation. Rather, the Boy Scouts only exclude a member for conveying a message the Scouts do not wish to convey. Yet the Supreme Court emphasized in *Hurley* that a speaker's autonomy includes the right to exclude members who convey an unwanted and antithetical message. This Court explicitly stated that the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. As a result, the Court unanimously held that requiring "private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey" violates the First Amendment. *Id.* at 559. Thus, requiring the Boys Scouts to include members who convey a message the organizers do not wish to express clearly violates the First Amendment and directly contradicts *Hurley*.

#### A. The Boy Scouts Merely Seek To Prevent Their Members From Conveying A Message The Scouts Do Not Wish To Convey.

The Second Circuit confused the Boy Scouts' message with the sexual orientation of the group's members. The Boy Scouts seek only to prevent a member from conveying a message the group does not wish to convey. The Boy Scouts

do not exclude any scout merely on the basis of sexual orientation. Indeed, the Court of Appeals did not dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Boy Scouts of America v. Wyman*, 335 F.3d 80, 85 (2d Cir. 2003) (quoting a letter from the Boy Scouts which stated their policy as not registering "*avowed* homosexuals" as adult volunteer leaders or youth members but that "other jobs within scouting are open to known or avowed homosexuals") (emphasis added). It is only when a member verbalizes a message that the Boy Scouts do not wish to convey that the Boy Scouts take any action at all. *See* A 1075 ("Boy Scouting makes no effort to discover the sexual orientation of any person. Scouting's message is, however, compromised when [messages] inconsistent with BSA standards" are conveyed.). Thus, the Boy Scouts only exclude a member on the basis of a conveyed message that is antithetical to the Boy Scout Oath and the Boy Scout Law—two of the fundamental ways in which the Scouts express their fundamental values and ideas. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 649 (2000) (quoting the Boy Scouts mission statement, which states: "The values we strive to instill are based on those found in the Scout Oath and Law"); *see also id.* at 641 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression.") (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981)).

In *Hurley* the Supreme Court acknowledged this same distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation. The Court noted that the Council did not seek to exclude homosexuals from

participation in the parade. *See Hurley*, 515 U.S. at 572 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march."). The Council only sought to prevent marchers from carrying a banner whose message the Council did not wish to convey. *See id.* at 573 ("[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."); *see also New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 362 (S.D.N.Y. 1993) (concluding that, because the Ancient Order of Hibernians ("AOH") allows "marchers whose sexual orientation is different from that approved of by the AOH to march in the Parade without a banner as guests of the various Parade contingents[,] . . . the true reason the AOH and the Parade Committee seek to exclude ILGO [the Irish Lesbian and Gay Organization] is because ILGO would insist on marching under a separate banner that would, in effect, identify the AOH as condoning sexual practices contrary to the message that the AOH believes the Parade should convey.").

In fact, the Supreme Court in *Hurley* agreed that it was clearly erroneous to equate exclusion on the basis of a group's message with exclusion on the basis of its members' sexual orientation. Justice Souter approvingly quoted the dissenting opinion of Massachusetts Justice Nolan. *See Hurley*, 515 U.S. at 565-66. Like the unanimous Supreme Court, Justice Nolan had also concluded that the Council's message was protected under the First Amendment because exclusion on the basis of a message was fundamentally different from exclusion based on sexual orientation. *See id.* at 565 ("[Justice Nolan] found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of 'overwhelming evidence' that the Council objected to GLIB on account of its message and a dearth of testimony or documentation

indicating that sexual orientation was the bar to admission.") (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1304 (Mass. 1994)). The Supreme Court has therefore emphasized this distinction between exclusion on the basis of a message and exclusion on the basis of sexual orientation.

Furthermore, the trial court in *Hurley* acknowledged, and this Court affirmed, that homosexuals' self-identification is a viewpoint that private associations have a constitutional right to exclude. 515 U.S. at 574 (holding that "the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals"). Justice Souter reiterated that the trial court had "found the Council's 'final position [to be] that GLIB would be excluded *because of its values and its message, i.e., its members' sexual orientation.*'" *Id.* at 562 (emphasis added) (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, No. 92-1518, 1993 Mass. Super. LEXIS 320, 324 n.5 (Mass. Super. Ct. Dec. 15, 1993)) (citing Tr. of Closing Arg. 43, 51-52 (Nov. 23, 1993)).

Thus, the Supreme Court has recognized that self-identification of one's sexual orientation through speech necessarily conveys a distinct message and a particular viewpoint. Excluding a person because of a message that is conveyed through speech (i.e., through self-identification of one's sexual orientation) should therefore be understood as completely distinct from excluding a person merely on the basis of his or her sexual orientation. The Boy Scouts, however, only exclude a member if he or she speaks a message with which the Scouts disagree.[3]

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[3] Under Connecticut's supposed rationale for excluding the Boy Scouts, it is inexplicable how the State was able to distinguish between the Boy Scouts and the Connecticut Stonewall Foundation, another organization in the State Employee Charitable Campaign, if the State was actually applying *Hurley* consistently. In a deposition at the trial level, testimony from Leslie Brett (former Chair of the Connecticut Commission on Human Rights & Opportunities

### B. The Boy Scouts, Like the Council in *Hurley*, May Exclude Those Members Imparting a Message the Scouts Do Not Wish to Convey Because the First Amendment Fully Protects a Speaker's Autonomy To Choose the Content of His Own Message.

The Boy Scouts may exclude those members imparting a message the Scouts do not wish to express. As this Court emphasized in *Hurley*, the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." 515 U.S. at 573. In *Hurley* the Council exercised this autonomy to choose the content of its message by excluding participants who conveyed an antithetical message. But as demonstrated in I.A. above, the Boy Scouts take the exact same action as the Council in *Hurley*. Both organizations only exclude a member or participant who conveys an antithetical message. Therefore, in restricting the Scouts' "autonomy to choose the content of [their] own message," Connecticut violates the First Amendment. The Second Circuit's decision thus dismantles this Court's unanimous holding in *Hurley* that the state cannot compel an organization of private citizens to include members who express a viewpoint or message with which the speaker disagrees. 515 U.S. at 559.

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and a member of the Stonewall Foundation) indicated that the Stonewall Foundation was *not* excluded from the Charitable Campaign, even though people opposed to homosexuality are not allowed to present Stonewall's message, on the basis that Stonewall has both heterosexual and homosexual members. *See* A 352-53 (stating that the Stonewall Foundation has "not knowingly" ever [accepted] a member who was opposed to gay or lesbian rights and that if they knew: "We wouldn't include that person in our activities *speaking* or educating the public. . . . We wouldn't let that person *speak* or represent the Stonewall Foundation.") (emphasis added). But this policy is exactly the same as the Boy Scouts' policy. The Boy Scouts have both heterosexual and homosexual members, but advocates of homosexuality are not allowed to present the Boy Scouts' message. The two organizations' policies regarding speech, membership, and advocacy are thus indistinguishable.

As the Court emphasized in *Hurley*, the State cannot abridge free speech rights even in the name of preventing discrimination. The Second Circuit, however, has held that Connecticut's decision to exclude the Boy Scouts from its State Employee Charitable Campaign for alleged violations of Connecticut's Gay Rights Law does not violate the Scouts' First Amendment rights. *Wyman*, 335 F.3d at 99; Conn. Gen. Stat. § 5-262(a)(3) (1998); *id.* at § 46a-81. In so holding, the Second Circuit ignored the distinction in *Hurley* between exclusion from participation based on sexual orientation and exclusion of a particular message. *Hurley*, 515 U.S. at 559. As stated in I.A above, the court in *Wyman* did not even dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Wyman*, 335 F.3d at 85; *see also Dale*, 530 U.S. at 651-53. However, the Second Circuit ignored the fact that the Boy Scouts only prohibit a person from participating if that person expresses a viewpoint contrary to the Boy Scout Oath and Boy Scout Law. As counsel for the Boy Scouts said in oral argument in *Dale*, the scoutmaster "put a banner around his neck" by expressing ideas that the Boy Scouts do not wish to convey. 530 U.S. at 696. The Second Circuit in *Wyman* therefore commits the error that concerned this Court in *Hurley*—namely, abridging the speech rights of private citizens in the name of preventing discrimination. This the First Amendment does not allow.

The Boy Scouts, like the Council in *Hurley*, may exclude those members imparting an antithetical message because the First Amendment fundamentally protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The Court in *Hurley* explicitly rejected the lower court's supposed justifications for altering the content of a private organization's message. *Id.* (chastising an "approach" in which "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all

those protected by the law who wished to join in with some expressive demonstration of their own"). The Supreme Court declared that "this use of the State's power violates the fundamental rule of protection under the First Amendment, *that a speaker has the autonomy to choose the content of his own message.*" *Id.* (emphasis added); *see also Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects the [petitioners'] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing.").

The Boy Scouts, therefore, like the Council in *Hurley*, have the same First Amendment autonomy in choosing their own message. *See Hurley*, 515 U.S. at 574. The Boy Scouts and the Council are like authors or composers. Under the First Amendment, they all have the autonomy to choose the message that their group, their parade, their book, or their symphony conveys. *See id.* ("Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."). The State may not add one sentence to an author's book, may not insert one note to a composer's symphony, and likewise may not compel the Boy Scouts to include a member who conveys an unwanted and antithetical message. *See id.* ("[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.").

Indeed, this Court's unanimous decision in *Hurley* made clear that, because a speaker has the autonomy to choose his own point of view, a speaker may exclude those with

contrary messages *for whatever reason*. *See Hurley*, 515 U.S. at 574-75. The Court stated:

> The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. *But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.*

*Id.* (emphasis added).

As a result, a private organization's exclusion of certain members on the basis of the message that those members are conveying is protected by the First Amendment. This protection of *speech* is fundamental and was determinative in *Hurley*. A private organization's exclusion of certain members with whom the organization does not wish to *associate* may or may not receive constitutional protection depending on the case. *Compare Boy Scouts of America v. Dale*, 530 U.S 640, 655 (2000) (holding that a state may not prohibit the Boy Scouts from adhering to their viewpoint as expressed in their internal leadership policy) *with Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (holding that compelling the Jaycees to admit women did not violate freedom of association if admission of women did not "impede the organization's ability . . . to disseminate its preferred views"). In contrast, this Court has unanimously held that a private organization's exclusion of certain members on the basis of the *speech* that those members are conveying definitely receives First Amendment protection. *See Hurley*, 515 U.S. at 559 ("The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among its marchers a group

imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.").[4]

### C. Because the Boy Scouts Have the Autonomy To Choose the Content of Their Own Message, the State, in Compelling the Inclusion of an Unwanted and Antithetical Message, Violates the Boy Scouts' First Amendment Guarantee of Freedom of Speech.

Connecticut violates the Boy Scouts' freedom of speech because the State compels the Scouts to include an unwanted and antithetical message. *Hurley* and a long series of compelled speech cases indicate that the autonomy to convey a message necessarily includes freedom from compelled speech. In *Hurley*, the Court held that forcing the Boy Scouts to include GLIB compelled the Boy Scouts to alter their message. Yet the result in *Hurley* would have been exactly the same if the State had denied the Council a parade permit because of the Council's refusal to include GLIB. Both instances constitute compelled speech. Similarly, here, the State of Connecticut's action constitutes compelled speech of the Boy Scouts whether (i) the State allows the Boy Scouts to participate in the State Employee Charitable Campaign but mandates the inclusion of individuals with an antithetical message, *or* (ii) the State denies the Boy Scouts access to the State Employee Charitable Campaign for refusing to include individuals with an antithetical message.

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[4] Of course, the distinction between the Court's treatment of free association and free speech does not preclude the possibility that a State is simultaneously violating both. For instance, this *amicus* argues that Connecticut violates the Boy Scouts' freedom of speech, but believes that Connecticut's actions actually violate both of these fundamental constitutional rights. *Cf. New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) (finding it unnecessary to rule on the issue of freedom of association but acknowledging "there may well be substance to this argument" after deciding the case on the basis of freedom of speech).

Either way the State's action constitutes compelled speech under *Hurley*.[5] *See Hurley*, 515 U.S. at 563 (rejecting as unconstitutional the lower court's supposed justification that "because the state did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation" the "infringement" on the First Amendment was only "incidental"); *see also infra* I.4.

Writing for the Court in *Hurley*, Justice Souter emphasized that forcing a particular view onto a speaker clearly violates the speaker's autonomy to convey his own message. *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) ("[If] the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.").

Justice Souter emphasized the importance of the speaker's First Amendment right not to convey a message that he does not want to express. *See Hurley*, 515 U.S. at 573 ("'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (quoting *Pacific Gas & Electric Co.*, 475 U.S. at 11, 16); *id.* ("[The State] may not

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[5] Imagine, for example, if the State mandated that a person must say "I love Democrats" or "I love Republicans" in order to vote or if a person had to salute the flag in order to have access to a public park. Such mandates constitute compelled speech whether or not the person decides to vote or use the park. Or suppose that the State implemented an eighty percent tax on everyone but would reduce the tax to twenty percent for any citizen willing to state a certain message. The State could not argue that, because citizens remain "free" not to make the statement, this scheme would not constitute compelled speech.

compel affirmance of a belief with which the speaker disagrees . . . .") (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

Moreover, the very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind. *Thomas v. Collins*, 323 U.S. 516, 545 (1945); *see also Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (First Amendment adopted to curtail power of Congress to interfere with individual's freedom to "express himself in accordance with the dictates of his own conscience"); *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 369 (S.D.N.Y. 1993) ("Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell. The humor of naming the thought police the 'Human Rights Commission' is particularly Orwellian.").

Just as selective exclusion from a public forum by the State may not be based on content, *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972), neither may a citizen be compelled to express the ideological views of the state. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *see also Redgrave v. B.S.O.*, 855 F.2d 888, 906 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1988) ("We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.").

Indeed, this Court has repeatedly emphasized that the State is just as constrained in mandating speech as it is in

prohibiting speech. *See Riley*, 487 U.S. at 796-97 ("[I]n the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Wooley*, 430 U.S. at 714 ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") (quoting *Barnette*, 319 U.S. at 637); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (Requiring newspapers to give equal reply space to those they editorially criticize "operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter.").

Thus, *Hurley* and the Court's other compelled speech precedents indicate that a speaker's autonomy to convey a message necessarily includes freedom from compelled speech. In compelling the inclusion of an unwanted and antithetical message, the State of Connecticut is thus violating the Boy Scouts' First Amendment guarantee of freedom of speech. The United States Supreme Court has already held that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. . . . The Commission's order also impermissibly requires an appellant to associate with speech with which appellant may disagree." *Pacific Gas & Electric Co.*, 475 U.S. at 9, 15. However, "impermissibly requir[ing] an appellant to associate with speech with which appellant may disagree" is exactly what Connecticut is attempting to do by requiring the Boy Scouts to include speakers with which they disagree.

### D. The Second Circuit's Rationale That the Boy Scouts Must "Pay-a-Price" For Speech Has Already Been Rejected Explicitly In *Hurley*.

The Second Circuit's supposed rationale that the Boy Scouts must "pay-a-price" for exercising their First Amendment rights has already been rejected in *Hurley*. The Second Circuit admits that its interpretation "may be cold comfort to those whose expression the law, in practice, limits." *Wyman*, 335 F.3d at 95 n.8. However, the Second Circuit then asserts that the speech restriction is justified because "Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme . . . under which, as it happens, the BSA *pays a price* for doing so." *Id.* (emphasis added).

Yet the Supreme Court unanimously rejected this "pay-a-price" for speech rationale when the lower court in *Hurley* also offered it as a supposed justification for restricting First Amendment rights. The Court stated in *Hurley*: "[t]he court [below] held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination." *Hurley*, 515 U.S. at 563 (citation omitted). However, the Supreme Court unanimously reversed this decision. The reversal illustrates this Court's emphatic rejection of the constitutionality of this "pay-a-price" rationale for restricting First Amendment rights.

The "pay-a-price" for speech rationale must fail even though some incidental restrictions on speech have been upheld where the purpose of the restriction is unrelated to the content of the expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1980). These incidental restrictions on protected speech, however, are only justified if they are content-neutral. The government may not consider either the

content or subject matter of the speech. *See Consolidated Edison Co. of N.Y. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *see also Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Here, however, the State has attempted impermissibly to change the communicative message of the Boy Scouts by requiring them to include scouts who convey a message that is antithetical to the Scout Oath and Scout Law. Because these conditions can hardly be confused with time, place, or manner restrictions, they violate the First Amendment.

Furthermore, proscribing the Boy Scouts from excluding certain messages would lead people to believe that the Boy Scouts actually endorse those ideas. There is no customary practice in which the Boy Scouts disavow the views of individual scouts. It would be just as impracticable for the Boy Scouts to disavow every viewpoint expressed by individual scouts as the Court recognized it would be for the Council in *Hurley* to disavow every viewpoint of parade participants. *See Hurley*, 515 U.S. at 576-77 ("Although each parade unit generally identified itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."). *But cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994) ("[T]here appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (The owner of a shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."). Each Scout who wears the Boy Scout uniform and speaks affects the

overall message of the Boy Scouts. *Cf. Hurley*, 515 U.S. at 572-73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' applications of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."); *id.* at 577 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that . . . [the] overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."). Thus, prohibiting the Boy Scouts from excluding certain messages would lead people to believe erroneously that the Boy Scouts actually endorse those ideas.

Finally, like the Council in *Hurley*, the Boy Scouts do not forfeit the protection of the First Amendment even if the Scouts' message regarding sexual orientation is not the exclusive subject matter of their speech. *See Hurley*, 515 U.S. 569-70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."). Indeed, the First Amendment protection of a speaker's autonomy to choose the content of his own message does not even depend on the relative clarity of the message. See *id.* at 569 ("[A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, the music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.") (citation omitted).

Thus, as *Hurley* demonstrates, the Second Circuit's "pay-a-price" for speech rationale is unconstitutional; it is impracticable for the Boy Scouts to disavow the viewpoints of its individual members; and the First Amendment protects the Boy Scouts' choice of message even if that message is not the exclusive subject matter of their speech. The Boy Scouts' freedom of speech, like the Council's freedom of

speech in *Hurley*, cannot be limited by any of these supposed justifications. Overall, the Boy Scouts' fundamental autonomy to choose the content of their own message, including the right to exclude members who convey an antithetical message, is protected by the First Amendment and this Court's unanimous decision in *Hurley*.

The decision in *Wyman*, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions. There are 150 charitable campaigns run by states, public universities, and local governments. More than 140,000 charities participate. Furthermore, if the Second Circuit's decision is allowed to stand, any State could mandate that a citizen or group must convey a certain message in order to receive any public benefit including not only parade permits and access to charitable campaigns but also access to public parks, access to civic facilities, access to welfare, Medicare, Medicaid, and Social Security benefits, and possibly even access to voting.

The words of Massachusetts Justice Nolan are just as applicable to the Second Circuit's decision in *Wyman* as they were when he wrote them about the lower court's decision in *Hurley* before its unanimous reversal:

> Today will be regarded as a sad and frustrating day in the history of the First Amendment to the United States Constitution. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even to

> imagine such an obvious violation of the revered rights to free speech.

*Irish-American Gay, Lesbian & Bisexual Group of Boston*, 636 N.E.2d at 1301 (Nolan, J., dissenting).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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